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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1906.

No. 91.

MRS. CAMILLE CAHEN, MRS. JULIA KAHN, EVA CAHEN, ET ALS., PLAINTIFFS IN ERROR,

vs.

JOHN BREWSTER, TAX COLLECTOR FOR THE SECOND DISTRICT OF THE CITY OF NEW ORLEANS, STATE OF LOUISIANA, AND ANDREW H. WILSON, PRESIDENT SCHOOL BOARD OF THE CITY OF NEW ORLEANS, STATE OF LOUISIANA.

ERROR TO THE SUPREME COURT OF LOUISIANA.

SUPPLEMENTAL BRIEF FOR DEFENDANTS IN ERROR.

F. C. ZACHARIE,
Of Counsel for Defendants in Error.

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As we stated in our original brief herein, it was prepared and in the printer's hands without our having had access to the brief of our opponents, plaintiffs in error. We now desire to reply to certain points raised and authorities cited and quoted from, as well in their brief as in their oral argument.

It is to be noted especially that Levy died May 26, 1904; the Louisiana act of 1904 was approved June 28, 1904, and

in its last clause, in the last section (6), it was provided *"that this act shall take effect from and after its passage,"* thus making it operative on June 28, 1904, and not on July 30, as erroneously stated by our opponents, this error having misled us in so stating in our original brief.

The final account and tableau of distribution was filed August 30, 1904 (Trans., p. 10), and the order promulgating it was rendered and signed August 16, 1904. On October 19 the executors filed an answer to the rule of the legatees to turn over the funds to them (Trans., p. 15), and on October 25 the proceedings to enforce the collection of the inheritance tax were filed (Trans., p. 18).

Our opponents (pp. 10 to 30 of their brief) hark back to the proposition, vainly sought to be maintained by them in the courts of Louisiana, that under the Louisiana constitution and laws the death of the testator vested rights in the legatees which could not be reached by the inheritance statute subsequently passed. They cite copiously from former Louisiana decisions and other authorities in an endeavor to maintain this proposition, which was so directly negatived in the Louisiana courts. They endeavor on pages 26 to 29 of their brief to show that the Supreme Court of Louisiana subsequently overruled their decision in the case at bar (in 40 Southern Reporter, 445; 115 La., 1025), and that, too, in face of the declaration of that honorable court, which they quote and italicize on page 29: *"The case of the Succession of Levy (La.), 39 Sou. Rep., 37, was decided from considerations peculiar to an inheritance tax, which can have no application in the instant case."* Thus the Supreme Court of Louisiana, instead of overruling its decision in the present case at bar, differentiates it from the Hutchinson case, in 115 Louisiana, and thus incidentally, as it were, reaffirms its decision in this (the Levy) case. Thus we find that, in so far as the alleged repugnancy to the constitution and laws are concerned, the highest court of Louisiana having decided that none existed, those points, as we said in our

original brief, are entirely eliminated from discussion here, as we have already shown that this honorable court will not go behind or revise the decision of the supreme court of a State in matters concerning the constitution and laws of that State, however much your honors may differ in opinion therewith.

There remains, then, only

The Federal Question

as to whether the Louisiana statute offends against the provisions of the Constitution of the United States by making the statute operative on successions then open and in course of administration at the time of the passage of the act.

We have already shown, we think, conclusively in our original brief that this honorable court has, in 17 Howard, 456, and 183 U. S., 278, distinctly and directly negatived our opponents' contention in cases directly in point with the present case at bar. Our opponents have attempted to break the force of these decisions by citations and quotations from the opinions of the Court of Appeals of New York subsequent to the New York case of Orr *vs.* Gilman.

The first case which they cite and quote from is the Pell case (171 N. Y., 48), in which the court decided that the New York act of 1899 would not apply to remainders and reversions created by a will of the decedent, who died April 14, 1863. That court decided that the New York act of 1899 was in contravention of the article and amendment to the Constitution of the United States. This decision is based upon the peculiar laws and jurisprudence of New York, which treat the rights of a *remainderman or person* as taking effect and as being *absolutely* vested at the time of the death of the testator (pages 54 and 55). This is not the law of Louisiana, for, as the judge of the district court said in this case at bar:

"If Mr. Levy's death and testament vested rights in said legatees, *those rights were subject to the administration and*

settlement of the estate, and remained involved in his succession, which up to this day is not finally closed, but, as to the things and sums devised to the particular legatees, and as to the funds to meet the inheritance tax if so ordered, is still in the hands of the executors." (See Carter Congreve *et al. vs.* City, 33 A., 816, citing State *vs.* Brown, 32 A., 1020, and Stewart case, 28 A., 180; Rec., 872, 873.)

"BUT IT MUST BE NOTICED THAT THE RULE LE MORT SAISSIT LE VIF, WHILE APPLICABLE TO HEIRS AND INSTITUTED HEIRS, HAS NO APPLICATION TO PARTICULAR LEGATEES (Rec., 940, 942); AS TO THEM, THE BASIS OF THE ARGUMENT THEREFORE WHOLLY FAILS.

"As already stated, the act 45 of 1904 was operative here July, 1904. My conclusion, therefore, is that it was not and is not retroactive as to said succession, then under administration and not yet closed; that its provisions do not affect vested rights of any person therein interested, in the sense and meaning of the constitution; that it is applicable to this succession, and that the inheritance tax levied by it must be paid before delivery, in full, to the instituted heirs or to the particular legatees" (Trans., p. 22). (The italics and capitals are our own.)

By an error in copying the transcript, we opine, the citations of his honor on the above are Rec., 872, 873, 940, and 942, when they should be Revised Civil Code of Louisiana, articles 872, 873, 940, and 942. Article 873 reads:

"The succession not only includes the *rights and obligations of the deceased as they existed at the time of his death, but all that has accrued thereto since the opening of his succession,* AS ALSO THE NEW CHARGES TO WHICH IT BECOMES SUBJECT."

Article 940 reads:

"A succession is acquired by the legal heir, who is called by law to the inheritance immediately after the death of the deceased person to whom he succeeds.

"This rule applies to testamentary heirs, BUT NOT TO PARTICULAR LEGATEES." (The italics and capitals are our own.)

So that, unlike the law and jurisprudence of New York in regard to remaindermen, the Louisiana law, by the very

text of the Civil Code (art. 872), provides that the succession is liable, not only to all the obligations as they existed at the time of the death of the testator, but all that has accrued thereto since the opening of the succession, and also the new charges to which it becomes subject, such as this inheritance tax, which is emphatically a "new charge;" so also under, article 940, R. C. C., the rule of *le mort saissit le vif* does apply to testamentary heirs, but *not* to particular legatees, as in the case at bar, their rights only being vested at the close of the succession.

R. C. C., article 1625, provides:

"Every legacy not included in the definition before given of universal legacies, and legacies under a universal title, is *a legacy under a particular title.*" (Italics are our own.)

R. C. C., article 1626, provides that the particular legatee can take possession only from the day the demand of delivery was formed, or from the day when it was voluntarily delivered to him.

R. C. C., article 1606, provides that "a universal legacy is a testamentary disposition, by which the testator gives to one or several persons the whole of the property which he leaves at his decease." So it is plain that the legatees herein are particular legatees, and as such their rights and seisin are not vested until the property bequeathed actually enters into their possession, which is not the case here.

But besides see page 22 (Trans., p. 3) of our brief and 20 Montana. The Supreme Court of Louisiana has decided that, even if vested at the time of death, it was not such a vestiture as to deprive the State of the right of taxing under the inheritance tax.

The case in 104 N. Y., 321, cited by our opponents, in our opinion at least, has no relevancy or pertinency to the case at bar. The New York case, 182 N. Y., 238, is similar to the case (171 N. Y., 48) in regard to the vested rights of remainder persons, and neither of these two cases has any application to the case at bar under Louisiana law, as we have

already shown hereinabove. The Louisiana Supreme Court (Trans., p. 38) affirmed the decision of the court *a qua*, saying:

"The right was *not absolutely vested in the heirs* free from all possible taxation, and in consequence the alleged retroactivity of the law, even if retroactive, could be of no avail as a defense against the tax (citing authorities). These legatees have unquestionably a right to the property to the extent of their respective legacies—an undisputed right subject to no demand, except that of the State in its sovereign capacity for the maintenance of the State in its sovereign capacity." (Italics are our own.)

So that the Louisiana Supreme Court, construing and interpreting the Louisiana Revised Civil Code and the jurisprudence of that State, marks the difference between the New York law in regard to remaindermen and particular legatees, showing that the inheritance act of that State violates none of the provisions of the Louisiana constitution or its jurisprudence; and, as we have already said, this court will not review or reverse that decision.

The cases cited by our opponents (166 U. S., 226; 199 U. S., 194) have no relevancy, in our opinion, to the point involved in the case at bar. Cooley on Taxation (2d ed.), page 376, says, under the heading of "Property of Decedent Estates:"

* * * "And it will continue to be taxable to the estate or its representatives *until actually distributed*, but not afterwards." (Italics are our own.)

And authorities are cited to this text in note 4. So Am. and Eng. Encyc. of Law, vol. 27, p. 352, says:

"In the absence of any express statutory direction, the better rule would seem to be that the *tax is due when the property bequeathed or devised actually vests.*" (Italics are our own.)

The same text is repeated in the sixth edition of the same work on page 667, with a number of more recent decisions supporting the text in note 4.

And again, on pages 341 and 342 of the same volume:

"The law in force at the time of the decedent governs the imposition of the tax. Neither an original nor an amending nor a repealing act can act retroactively, *so as to affect rights vested at the time of its passage, unless the act itself expressly so provides*," as the Louisiana act 45 of 1904 so provides. (Italics are our own.)

In the note (1) to the text there are cited 110 Iowa, 290; 20 Montana, 299, and Lines' Estate, 155 Penn. St., 378, and others. In 110 Iowa, 299, that court said, in relation to an amendatory act in regard to the inheritance tax passed after the opening of the succession:

"And if the original act was cured by the amendatory act, we see no reason why it should not be made to apply to estates undistributed at the time the amendatory act went into effect."

So in 20 Montana, 299, it was decided that "the section of the law which provides that it shall apply to 'all estates which have been probated before, and shall be distributed after the passage of' the act is not unconstitutional." In that case the act became a law on March 4, 1897, and the testator died May 6, 1896. The will was duly probated in 1896, and administration was had. On July 19, 1897, the district court ordered a distribution of the estate and discharge of the executors. Before this order was issued, however, the county authorities claimed the inheritance tax under the act of March 4, 1897, passed nearly a year after the death of the testator and the opening of his succession.

It was claimed by the respondents (p. 300) (as it is in the present case at bar) "that the act is repugnant to the fourteenth amendment to the Federal Constitution, in that it denies to persons within the jurisdiction of Montana the

equal protection of the laws." The Supreme Court of Montana, in an able and lengthy opinion, denied and negatived this contention, citing and quoting some twenty decisions from Federal and State authorities in support of its conclusions, and said (p. 314):

"In conclusion, our judgment is that the act is constitutional, as affecting the estate involved in this case, and that the lower court erred in holding otherwise."

155 Penn. St., 391, turns upon the question of the situs of the property on which the inheritance was claimed. Another principle in the 20th Montana case is announced on which that decision was grounded, and that is no "vested rights" can interfere with the right of the State by a retroactive act to tax the privilege or property. (See 20 Montana, pp. 311, 312, 313, 314.) This is the principle of the civil law Laurent Principes de Droit Civil Francais (Tom. I, pp. 221, 222, *et seq.*), and that, too, under article 11 of the Constitution, which provides that "no one can be deprived of his property except for a cause of public utility, in the case and in the manner established by law, and only for a just and sufficient indemnity previously paid" (sec. 147, p. 220, *ibid.*). So that under the civil law a retroactive statute in the interest of public order or public use is not unconstitutional.

All of which is respectfully submitted.

F. C. ZACHARIE,
Of Counsel for Defendants in Error.

Supreme Court of the United States.

No. 91.—October Term, 1906.

Mrs. Camille Cahen, Mrs. Julie Kahn, Eva Cahen, et al., Plaintiffs in Error,
vs.
John Brewster, Tax Collector for the Second District of the City of New Orleans, State of Louisiana, and Andrew H. Wilson, President School Board of the City of New Orleans, State of Louisiana.

In error to the Supreme Court of the State of Louisiana.

[December 24, 1906.]

Mr. Justice McKenna delivered the opinion of the Court.

The case involves the validity, under the Constitution of the United States of a burden imposed under the inheritance tax law of the State of Louisiana, passed June 28, 1904.

Mathias Levy, a resident of New Orleans, died in that city May 26, 1904. He was unmarried and left no ascendants, and was, therefore, without forced heirs. He left a last will and testament of the date of December 23, 1903, in which he named executors and made sundry particular bequests to charitable institutions. He bequeathed the balance of his estate, in equal shares, to his two nieces, Camille Cahen and Julie Kahn, constituting them thereby his universal legatees and instituted heirs.

The will was duly probated in the Civil District Court for the Parish of Orleans, May 30, 1904. An inventory of his estate was taken June 9, 1904, and a supplementary inventory August 3, 1904. The inventories showed the total appraised value of the estate to be $64,676.05. Of this amount, after deducting the debts and charges of the estate and particular legacies, there was left, as the portion going to the universal legatees, $42,927.94.

The final accounting and tableau of distribution was filed August 3, 1904, and approved and homologated by judgment August 16, and the funds ordered to be distributed.

October 16 a motion was made for a rule on the executors to show cause why they should not pay over the legacies as ordered. In answer to which the executors replied that they were willing to do so, but that it was announced to them by the president of the school board of the parish that he intended to claim in behalf of said board a tax under the inheritance tax law of the State on the funds in their hands "and the shares coming to said movers." The executors also alleged the unconstitutionality

of the tax and prayed that the school board of the parish, thorough its president, Andrew H. Wilson, be made a party to the proceedings. Wilson appeared and averred that the taxes were due the State and not to the school board, and were collectible by the State tax collector, and "that this suit and the matters at issue herein should be litigated contradictorily with the State tax collector for the district in which the deceased resided when he departed this life."

The tax collector appeared. The agents and attorneys in fact of the legatees answered the demand of the school board to be paid the tax that $10,000 of the estate was in United States bonds, and not subject to taxation by the State, and averred that an inheritance tax was not due "to said board for the reason that said act has no application to the property under this succession or the legacies due to said movers in the motion aforeforesaid; that to give it such application would be to make said act retroactive and divest the vested rights of the said movers in said rule, which would be in violation of the constitution of this State, and especially article 166 thereof, and in violation of the Constitution of the United States of America, and especially section 9 of article I, and the Fifth and Fourteenth Amendments thereof, and in violation of the laws of the State and of the land; that it would be a deprivation of property without due process of law and a denial of the equal protection of the laws, in violation of the Fifth and Fourteenth Amendments of the Constitution of the United States of America."

Judgment was rendered in favor of the tax collector, condemning the executors to pay the tax, less the amount of United States bonds, and less the charitable and religious bequests. The judgment was affirmed by the Supreme Court of the State.

The law imposes a tax of three per cent "on direct inheritances and donations to ascendants or descendants," and ten per cent upon donations or inheritances to collaterals or strangers. It is provided that the tax is "to be collected on all successions not finally closed and administered upon, and all successions hereafter opened."*

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*SECTION 1. Be it enacted by the General Assembly of the State of Louisiana, That there is now, and shall hereafter be, levied, solely for the support of the public schools, a tax upon all inheritances, legacies and donations; provided, no direct inheritance, or donation, to an ascendant or descendant, below ten thousand dollars in amount or value, shall be so taxed; a special inheritance tax, of three per cent on direct inheritances or donations to ascendants or descendants, and ten per cent for collateral inheritances and donations to collaterals or strangers; provided, bequests to educational, religious or charitable institutions shall be exempt from this tax; and provided, further, that this tax shall not be enforced when the property donated or inherited shall have borne its just proportion of taxes prior to the time of such donation or inheritance; this tax to be collected on all successions not finally closed and administered upon, and all successions hereafter opened.

It will be observed that when Levy died May 26, 1904, and when the will was probated May 30, 1904, there was no inheritance tax in Louisiana. The act in controversy was passed June 28, 1904.

In support of the attack made upon the law, it is contended that an inheritance tax is not a tax on property but on the right or privilege of inheriting, and that the right in the case at bar had been exercised at the moment of the testator's death under the then existing law, and "to pass a law exacting such a tax and make it retroactive so as to divest a right previously acquired under then existing laws, is a deprivation of property already acquired, without due process of law, prohibited by the Fourteenth Amendment of the Constitution of the United States."

To sustain their propositions the plaintiffs in error cite certain articles of the Louisiana Civil Code.* And it is urged as indubitable that, under the law of Louisiana, a succession is acquired by the legal heir immediately after the death of the deceased, and by the express terms of the code this rules applies to testamentary heirs, to instituted heirs and universal legatees. In other words, that the acquisition of the succession by plaintiffs in

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*ARTICLE 940. A succession is acquired by the legal heir, who is called by law to the inheritance, immediately after the death of the deceased person to whom he succeeds..

This rule applies also to testamentary heirs, to instituted heirs and universal legatees, but not to particular legatees.

ARTICLE 941. The right mentioned in the preceding article is acquired by the heir, by the operation of the law alone, before he has taken any step to put himself in possession, or has expressed any wish to accept it.

Thus, children, idiots, those who are ignorant of the death of the deceased, are not the less considered as being seized of the succession, though they may be merely seized of right and not in fact.

ARTICLE 942. The heir being considered seized of the succession from the moment of its being opened, the right of possession, which the deceased had, continues in the person of the heir as if there had been no interruption, and independent of the fact of possession.

ARTICLE 944. The heir being considered as having succeeded to the deceased from the instant of his death, the first effect of this right is that the heir transmits the succession to his own heirs, with the right of accepting or renouncing, although he himself have not accepted it, and even in case he was ignorant that the succession was opened in his favor.

ARTICLE 945. The second effect of this right is to authorize the heir to institute all the actions. even possessory ones, which the deceased had a right to institute, and to prosecute those already commenced. For the heir, in everything, represents the deceased, and is of full right in his place, as well for his rights as his obligations.

ARTICLE 1609. When, at the decease of the testator, there are no heirs to whom a proportion of his property is reserved by law, the universal legatee, by the death of the testator, is seized of right of the effects of the succession without being bound to demand the delivery thereof.

error was at the very moment of Levy's death, and, therefore, necessarily before the act imposing inheritance taxes was passed. To sustain their view plaintiffs in error cite a number of cases decided prior to the decision of the case at bar, and the case of *Tulane University of Louisiana* v. *Board of Assessors et al.*, (115 La. 1026,) decided since the decision in the case at bar. Having established, as it is contended, that by operation of law that the property is transmitted immediately from the testator to the heirs, it is also contended that from the very definition of an inheritance tax none could be imposed on plaintiffs in error as legatees of Levy.

For definitions of an inheritance tax plaintiffs in error adduce *United States* v. *Perkins*, (163 U. S. 625;) *Magoun* v. *Illinois Trust & Savings Bank*, 170 U. S. 283;) *Knowlton* v. *Moore*, (178 U. S. 41.) The tax was defined in the Perkins case to be "not a tax upon the property itself, but upon its transmission by will or descent;" and in the Magoun case, "not one on property, but one on the succession." In *Knowlton* v. *Moore* it was said that such taxes "rest in their essence upon the principle that death is the generating source from which the particular taxing power takes its being, and that it is the power to transmit, or the transmission from the dead to the living, on which such taxes are more immediately rested." But these definitions were intended only to distinguish the tax from one on property, and it was not intended to be decided that the tax must attach at the instant of the death of a testator or intestate. In other words, we defined the nature of the tax; we did not prescribe the time of its imposition. To have done the latter would have been to prescribe a rule of succession of estates and usurp a power we did not and do not possess. There is nothing, therefore, in those cases which restrains the power of the State as to the time of the imposition of the tax. It may select the moment of death, or it may exercise its power during any of the time it holds the property from the legatee. "It is not," we said in the Perkin's case, "until it has yielded its contribution to the State that it becomes the property of the legatee." See also *Carpenter et al.* v. *Commonwealth of Pennsylvania*, (17 How. 456.)

We must turn back, therefore, to the law of Louisiana for the solution of the questions presented in the case at bar. But we are not required to reconcile the Louisiana decisions. We accept that in the case at bar as a correct interpretation of the code of the State. Nor may we regard *Tulane University* v. *Board of Assessors* as irreconcilable with it. That case was brought to enjoin the collection of State and city taxes which had been assessed against the succession of A. C. Hutchinson. The plaintiff university was the universal legatee of Hutchinson, and its property was exempt from taxation under the constitution of the State. It is true the court said that the code of the State "left no room for doubt or surmises as to the fact of the property of a deceased person being

transmitted directly and immediately to the legal heir, or, in the absence of forced heirs, to the universal legatee, without any intermediate stage, when it would be vested in the successive representative or in the legal abstract, called 'succession.'"

But the decision in the case at bar was not overruled, but distinguished as follows: "The case of succession of Lævy was decided from considerations peculiar to an inheritance tax, and which can have no application to the instant case. This inheritance tax was held to be due notwithstanding that, under the provisions of the code, the ownership of the property passed to the heirs. The maxim, '*Le mort saisit le vif*,' was expressly recognized." Both decisions, therefore, must be considered as correct interpretations of the code of the State. It is not our province to pronounce one more decisive than the other, or to pronounce a contradiction between them, which the court which delivered both of them has declared does not exist. We must assume that the Tulane case approved the view expressed in the case at bar of the rights of legatees, as follows: "Furthermore, we have said, the legatees acquired no vested right to the property bequeathed which could enable them to successfully defend their inheritance against the demand of the State for the inheritance tax. It was property within the limits of the State, which the State could tax, for purposes mentioned, until it had passed out of the succession of the testator."

Plaintiffs in error also contended that the statute denied them the equal protection of the laws. This contention is based on the following provision of the statute: "This tax to be collected on all successions not finally closed and administered upon, and on all successions hereafter opened."

Successions which have been closed, it is said, are exempt from the tax, and a discrimination is made between heirs whose rights have become fixed and vested on the same day. Counsel say: "The closing of the succession cannot affect the question as to when the rights of the heirs vested; and cannot be a cause for differentiation among the heirs; and such a classification is purely arbitrary. Besides, such a classification rests on the theory that the tax is one on property, when in fact it is one on the right of inheritance." But, as we understand, the Supreme Court made the validity of the tax depend upon the very fact which counsel attack as an improper basis of classification. The court decided that the property bequeathed was property the State could tax, "until it had passed out of the succession of the testator." It was certainly not improper classification to make the tax depend upon a fact without which it would have been invalid. In other words, those who are subject to be taxed cannot complain that they are denied the equal protection of the laws because those who can not legally be taxed are not taxed.

Judgment affirmed.